

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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RAYMOND FRANCIS DERONDE,

Plaintiff,

v.

Civil Action No.  
7:16-CV-457 (DEP)

CAROLYN W. COLVIN, Acting Commissioner  
of Social Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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HOWARD D. OLINSKY, ESQ.  
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FOR DEFENDANT

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Special Assistant U.S. Attorney

DAVID E. PEEBLES  
CHIEF U.S. MAGISTRATE JUDGE

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of a partially adverse administrative determination by the Acting Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on November 28, 2016, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Acting Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

1) Defendant's motion for judgment on the pleadings is  
GRANTED.

2) The Acting Commissioner's determination that the plaintiff was  
not disabled between March 25, 2009 and July 16, 2015, and thus is not  
entitled to benefits under the Social Security Act for that period, is  
AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon  
this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: December 5, 2016  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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RAYMOND FRANCIS DERONDE,

Plaintiff,

vs.

7:16-CV-457

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

-----x  
Transcript of a **Decision** held on November 28,  
2016, at the James Hanley Federal Building, 100  
South Clinton Street, Syracuse, New York, the  
HONORABLE DAVID E. PEEBLES, United States Magistrate  
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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1 (In Chambers, Counsel present by telephone.)

2 THE COURT: All right. I'll have to let that be  
3 the last word. I have before me a request for judicial  
4 review of a partially unfavorable determination by the Acting  
5 Commissioner pursuant to 42 United States Code Section 405(g)  
6 and 1383(c)(3).

7 The background is as follows: Plaintiff was born  
8 in July 1965, is currently 51 years of age, was 42 years old  
9 at the time of his alleged disability onset back in 2007. He  
10 lives in Potsdam, apparently with his parents. He drives and  
11 drove three hours to the hearing conducted in January of  
12 2016. He has a high school diploma, and had two years of  
13 BOCES training in the field of HVAC and plumbing while in  
14 high school. He's been a truck driver since graduating high  
15 school both delivering locally and driving over the road. He  
16 has a CDL license.

17 At some point in his past, plaintiff fell off a  
18 tire and injured his back and suffers from chronic back pain.  
19 He also experienced an aneurysm, underwent surgery on  
20 December 15, 2007 for a subarachnoid brain hemorrhage. He  
21 was hospitalized later, two weeks after that, approximately,  
22 for ongoing headaches. He suffers from headaches three or  
23 more times a week that can last two to three hours. He  
24 complains of back and leg pain, vision issues, although in  
25 December of 2014, he tested at 20/20 vision in the left eye

1 and 20/25 in his right, that's at 12/15. He suffers from  
2 diabetes, short-term memory loss, and dizziness or vertigo.  
3 He treats with Dr. Jay Chapman, a family doctor, and has  
4 since January of 2008. He testified at the hearing and  
5 explained to Dr. Lorensen at page 1068 that he has a fairly  
6 robust regimen of daily activities including mowing the lawn,  
7 doing laundry, cooking, some, cleaning, shopping, watching  
8 television, and engaging in his hobby which is bird watching.

9 This case has had a tortured procedural history.  
10 The first application for Title II and Title XVI benefits was  
11 made by the plaintiff on September 22, 2008, alleging an  
12 onset date of December 14, 2007. A hearing was conducted by  
13 Administrative Law Judge Marie Greener on June 3, 2010. ALJ  
14 Greener issued her first decision on August 13, 2010,  
15 concluding that plaintiff was disabled from December 14, 2007  
16 to March 25, 2009, when he showed sufficient medical  
17 improvement to deny him benefits from that date forward. The  
18 Social Security Administration Appeals Council denied  
19 plaintiff's request for review on July 28, 2011.

20 On August 22, 2011, plaintiff initiated a judicial  
21 review action in this court. The result was a report and  
22 recommendation by Magistrate Judge Earl Hines on February 11,  
23 2013. That report and recommendation was adopted by our now  
24 Chief Judge Glenn T. Suddaby on March 7, 2013, determination  
25 was vacated and the matter remanded.

1           On October 24, 2010, ALJ Greener conducted a second  
2           hearing. She issued a decision on January 21, 2014 making  
3           basically the same finding. On June 11, 2015 the Social  
4           Security Administration Appeals Council vacated that second  
5           determination and remanded with certain instructions for the  
6           ALJ.

7           On January 7, 2016, Administrative Law Judge  
8           Jennifer Gale Smith held a hearing, and on February 17, 2016,  
9           ALJ Smith issued a decision arriving at the same conclusion.  
10          There was no Social Security Administration Appeals Council  
11          review so that ALJ Smith's determination is a final  
12          determination of the agency.

13          In her decision, ALJ Smith concluded that plaintiff  
14          had not engaged in substantial gainful activity since  
15          February -- I'm sorry, December 14, 2007, applying the  
16          familiar five-step sequential tests for determining  
17          disability; concluded at step two that plaintiff did, from  
18          December 14, 2007 to March 24, 2009, suffer from severe  
19          impairments limiting her ability to perform basic work  
20          activities -- his, I'm sorry, including status post brain  
21          aneurysm requiring craniotomy and stenting, headaches,  
22          diabetes mellitus, hypertension, degenerative disk disease of  
23          the lumbar spine, and obesity, carrying through with that RFC  
24          for that period of time; concluded at step three that the  
25          plaintiff's condition did not meet or medically equal any of

1 the listed presumptively disabling conditions set forth in  
2 the regulations. At step four, she concluded that plaintiff  
3 is unable to perform his past relevant work as a truck  
4 driver, and at step five, concluded that plaintiff was  
5 disabled during that period of time from December 14, 2007 to  
6 March 24, 2009.

7 Then, turning to the period following March 25,  
8 2009, ALJ Smith concluded that plaintiff suffered during that  
9 period from the following severe impairments: Status post  
10 brain aneurysm requiring craniotomy and stenting, headaches,  
11 diabetes mellitus, hypertension, degenerative disk disease of  
12 cervical and lumbar spine, obesity, mild cognitive  
13 impairment, a depressive disorder and anxiety disorder,  
14 hyperlipidemia, tachycardia, vasovagal reaction, stroke  
15 syndrome, syncope, vertigo, dizziness, hyperglycemia, mild  
16 diabetic retinopathy, small peripheral serous pigment  
17 detachment, anemia, atypical chest pain, dyspnea, fatigue,  
18 insomnia, sleep disturbance, vitamin deficiencies, dental  
19 caries, c-a-r-i-e-s, and sinusitis.

20 She concluded, however, at step three that none of  
21 those were sufficiently serious to equal or medically equal  
22 any of the listed presumptively disabling conditions.

23 The -- surveying the medical evidence, ALJ Smith  
24 concluded that plaintiff is able to perform sedentary work  
25 pursuant to the regulations but must be able to change



1 positions every 30 minutes but is able to stay on task at the  
2 work station during the position changes. She went on to say  
3 although the claimant is unable to kneel, crouch, squat,  
4 crawl, and climb ladders, ropes, and scaffolds, he is able to  
5 occasionally stoop, balance, and climb ramps and stairs. She  
6 also noted that the claimant is unable to work at unprotected  
7 heights and around dangerous moving mechanical parts of  
8 equipment, and that the claimant is able to engage in simple,  
9 routine, and repetitive tasks. Further, she stated that the  
10 claimant is able to work at a low stress job which is defined  
11 as a job with occasional changes in the work setting, and as  
12 a job that requires occasional judgment and occasional  
13 decision making.

14 In addition, the claimant is unable to work at a  
15 job that requires negotiation, arbitration, confrontation,  
16 and responsibility for the safety of others.

17 Applying that RFC finding, the administrative law  
18 judge concluded that, once again that plaintiff cannot  
19 perform his past relevant work as a truck driver. He noted  
20 that if the plaintiff were able to perform a full range of  
21 sedentary work, the grids or Medical Vocational Guidelines  
22 would compel a conclusion of no disability under Rules 201.21  
23 and 201.28.

24 With the assistance of testimony from a vocational  
25 expert, the ALJ concluded that plaintiff is capable of

1 performing as a document preparer, a dresser, and bench hand,  
2 and noted that as of July 17, 2015 as counsel has noted,  
3 under the grids, when plaintiff turned 50 he became disabled  
4 under Grid Rule 201.14.

5 As you know, my task is limited and the standard  
6 that I apply is extremely deferential. I must determine  
7 whether the determination of the Commissioner is supported by  
8 substantial evidence and resulted from the application of  
9 proper legal principles. When it comes to medical  
10 improvement, the standard is well known, I've seen it  
11 described variously, including an eight-step test that is  
12 required under 20 C.F.R. Section 404.1594 and 416.994. The  
13 essence, however, of those -- of the cases and regulations is  
14 it is the Commissioner's burden to establish by preponderance  
15 of the evidence that sufficient medical improvement has  
16 occurred and that the improvement relates to plaintiff's  
17 ability to perform basic work functions. If medical  
18 improvement is demonstrated, then the administrative law  
19 judge must go through the remaining steps and determine  
20 whether the plaintiff is now capable of performing with  
21 medical improvement the work in the national -- available  
22 work in the national economy. It's up to the Commissioner to  
23 weigh conflicting evidence.

24 The administrative law judge decision in this case  
25 is quite detailed. I note that the stooping issue was not

1 raised in plaintiff's brief, and I acknowledge the Acting  
2 Commissioner was somewhat disadvantaged by that; however,  
3 I've reviewed it and the administrative law judge does deal  
4 with the stooping issue, concludes that stooping is permitted  
5 on a limited basis, and that the no-stooping requirement is  
6 not supported and is not found and I cannot say that that is  
7 not a finding that is supported by substantial evidence. ALJ  
8 Smith went through and discussed stooping and the basis for  
9 her determination included Dr. Chapman's March 25, 2009  
10 determination that the plaintiff had recovered from his brain  
11 aneurysm with no neurological deficit, and in completing the  
12 form at pages 328 et seq. does go through certain of the  
13 plaintiff's systems and notes, among other things, at page  
14 330 that there does not appear to be any limitation of  
15 motion. That's at -- that's body system number 11. So it  
16 also -- Dr. Lorensen does not mention stooping in her report,  
17 although she does in the check-the-box form, but also does  
18 not report any findings in the body of her report that would  
19 support a limitation of no stooping. And there are other  
20 indicators in the record that would suggest that the  
21 plaintiff does not lack the ability to stoop. And  
22 Dr. Chapman, as it was indicated, does say that he is, in  
23 response to clarification at page 1065, plaintiff does state  
24 that plaintiff is able to perform sedentary work.

25 I will acknowledge that stooping is not mentioned

1 in the regulations cited, but I believe that there is  
2 substantial evidence in the record to support rejecting a  
3 no-stooping requirement while acknowledging clearly the  
4 conflict. And again, it's the Commissioner in the end that  
5 has to resolve the conflict as long as it is done in a  
6 meaningful way that permits intelligent judicial review, and  
7 is supported by substantial evidence.

8 On the disability freeze, I tend to accept  
9 plaintiff's argument with the exception of the question of  
10 rounding off and whether the calculation, the adjusted  
11 disability insured date should be March of 2015 or June of  
12 2015. But in any event, any error in that regard is  
13 harmless. The Commissioner has determined by definition that  
14 the plaintiff was not disabled prior to turning 50, and the  
15 plaintiff acknowledges that he did not turn 50 until after  
16 the expiration of his insured status under any view of the  
17 calculation.

18 So I find that the Commissioner's determination was  
19 supported by substantial evidence, resulted from the  
20 application of proper legal principles except potentially  
21 with regard to the disability freeze issue which, if it was  
22 error, it was harmless error.

23 So I will grant judgment on the pleadings to the  
24 defendant and affirm the Commissioner's determination.

25 Thank you both, this was an excellent case, and

1 interesting issues on both sides. Thank you both.

2 MR. MORRISON: Thank you, your Honor.

3 MR. EAGLIN: Thank you, your Honor.

4 (Proceedings Adjourned, 2:58 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
Official Realtime Court Reporter, in and for the  
United States District Court for the Northern  
District of New York, DO HEREBY CERTIFY that  
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Dated this 29th day of November, 2016.

/S/ JODI L. HIBBARD  
JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter